United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7551

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

Plaintiff-Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL, S.A.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE, WESTINGHOUSE ELECTRIC CORPORATION

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by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

FRCP 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released,

or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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ISMAEL ABU KHADRA, d/b/a THE MIDDLE EAST ELECTRO-MECHANICAL CORPORATION,

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-vs-

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Defendants-Appellees.

PRELIMINARY STATEMENT

This is a consolidated appeal by Ismael Abu Khadra ("plaintiff") from (1) a judgment entered against plaintiff in favor of Westinghouse Electric Corporation ("defendant") upon defendant's counterclaim, following plaintiff's default in replying thereto and failure to post a $25,000 bond required as a condition to excusing such default; and (2) from an order denying plaintiff's motion under Rule 60(b) of the Federal Rules of Civil Procedure ("FRCP") to set aside said judgment.

STATEMENT OF ISSUES PRESENTED

1. Whether District Court Judge Edward Weinfeld exceeded his power and abused his discretion in requiring plaintiff, a citizen of Saudi Arabia, to post a $25,000 bond as a condition to excusing his default in replying to defendant's $110,893 counterclaim, when plaintiff's complaint was not verified, his default was not adequately explained, he had not furnished an affidavit of merits and had no assets in this country.

2. Whether the Judge thereafter abused his discretion in directing entry of a default judgment against plaintiff upon defendant's counterclaim, when plaintiff failed to post said bond and failed to substantiate his claimed inability to do so.

3. Whether the Judge thereafter erred in denying plaintiff's motion under FRCP 60(b) to set aside said judgment, when said

motion was used as a vehicle for reargument and as a substitute for appeal from said judgment.

STATEMENT OF THE CASE

Plaintiff is a citizen of Saudi Arabia, where he resides and is engaged in the electrical and mechanical contracting business (A 58). In 1972, plaintiff entered into a contract with defendant for the purchase of certain electrical equipment required by plaintiff as a subcontractor in the construction of an airport in Saudi Arabia (A 6).

On September 30, 1974, falsely claiming to have a business office at 503 or 505 East Washington Street in Syracuse, New York, which is the office address of his attorney herein (A 4, 5, 10), plaintiff commenced an action for alleged breach of contract against defendant in the Supreme Court of the State of New York, County of Onondaga,

upon a summons and unverified complaint (A 4, 10, 16). The gravamen of plaintiff's complaint is that certain of the equipment was not manufactured in accordance with specifications or not timely delivered, causing plaintiff substantial damages (A 5).

On October 22, 1974, the action was removed by defendant to the United States District Court for the Northern District of New York (A 21), and on November 25, 1974, the action was transferred to the United States District Court for the Southern District of New York (A 17).

Meanwhile, defendant served its answer containing a counterclaim on October 29, 1974 (A 21), which was superseded by service of an amended answer containing the counterclaim on November 6, 1974 (A 11, 17), so that the existence of the counterclaim was twice called to plaintiff's attention. The counter-

claim is for the price of certain equipment sold, delivered and accepted by plaintiff, and for the price of certain equipment sold to plaintiff but wrongfully refused by plaintiff upon tender of delivery, aggregating $110,893.92 (A 11).

Plaintiff having defaulted in replying to the counterclaim, defendant, on February 15, 1975, moved for a default judgment pursuant to FRCP 55(b)(2), returnable on February 25, 1975 (A 13, 77).

After obtaining defendant's consent to an adjournment of said motion, plaintiff cross-moved on March 4, 1975, pursuant to FRCP 55(c), to set aside his aforesaid default (A 24, 77). Plaintiff's cross-motion was made without any affidavit by plaintiff showing a meritorious defense to the counterclaim and solely on an affidavit by plaintiff's attorney which, as will hereinafter be demonstrated, failed to adequately

show that plaintiff's default was due to excusable neglect (A 24, 26). Despite such deficiencies by plaintiff, defendant indicated that it would be willing to accept a bond to secure payment of any judgment to be entered upon its counterclaim, by way of alternative relief to defendant's motion for entry of a default judgment (A 40).

On April 1, 1975, Judge Weinfeld granted plaintiff's motion to set aside his default, and denied defendant's motion for a default judgment, both on condition that plaintiff post a $25,000 bond within 20 days (A 23, 31).

Plaintiff having failed to post such bond, on May 16, 1975 defendant moved for a default judgment, returnable on May 27, 1975 (A 42, 78).

Plaintiff's attorney submitted an affidavit to the effect that he had encountered difficulty and delay in communicating with his client in Saudi Arabia (A 53). Accordingly, on May 27, 1975, the

return date of defendant's renewed motion for default judgment, Judge Weinfeld adjourned said motion to June 24, 1975 at which time the parties were to return and report as to whether defendant had posted a bond in compliance with the court's order (A 78). In effect, Judge Weinfeld granted plaintiff a month's extension in which to post the bond.

However, on June 19, 1975, only four days before the extended deadline to post the bond, plaintiff moved, on his affidavit sworn to that day, returnable on July 1, 1975, to modify the prior orders by eliminating the bond requirement and for the first time challenging the authority of the Court to require him to post any bond (A 56, 58). As will hereinafter be demonstrated, said affidavit by plaintiff, which is the only affidavit submitted by him herein, is wholly insufficient either to show a meritorious defense to the counterclaim or to demonstrate his alleged inability to post the required bond.

On June 24, 1975, the adjourned date of defendant's renewed motion for default judgment, plaintiff's attorney made an oral application to further adjourn said motion pending the hearing of plaintiff's motion returnable on July 1, 1975 to eliminate the bond requirement (A 79). After admonishing plaintiff's counsel for not having proceeded by order to show cause and after reviewing the prior proceedings herein, Judge Weinfeld denied plaintiff's application for adjournment and granted defendant's motion for default judgment (A 52, 79). Thereupon, plaintiff withdrew his motion to eliminate the bond requirement and an order to that effect was entered on July 1, 1975 (A 62, 63).

On July 14, 1975, defendant noticed settlement of a judgment on its counterclaim, which was signed on July 22, 1975 and entered on July 24, 1975 (A 64, 66). Plaintiff did not

object to any part of the proposed judgment or submit any counter-judgment or request any stay of execution.

Instead, on August 21, 1975, plaintiff's attorney made an ex parte application to Judge Richard Owen for an enlargement of time until September 21, 1975 to appeal from the aforesaid judgment, on the ground that he had not been advised by the court clerk of the entry of the judgment, and admittedly for the purpose of making a motion under FRCP 60(b) to set aside the judgment (A 80, 84-87). Judge Owen granted the application on August 22, 1975 (A 80, 88).

On August 28, 1975, plaintiff moved under FRCP 60(b) to set aside the judgment (A 67). This motion was made on the affidavit of plaintiff sworn to on June 19, 1975 and which was previously submitted in support of his withdrawn motion to eliminate

the bond requirement (A 67, 69). It was accompanied by an affidavit of plaintiff's counsel (A 70), which was obviously intended to show that plaintiff has a meritorious defense to the counterclaim in view of the insufficiency of plaintiff's prior affidavit for that purpose, but which, as will hereinafter be shown, was also clearly inadequate for such purpose.

Defendant opposed plaintiff's Rule 60(b) motion on the ground that it was improperly being used as an attempted reargument of plaintiff's prior motions to cure his default without posting any bond, and as a substitute for an appeal from the prior adverse orders and judgment (A 75). On September 24, 1975, Judge Weinfeld made an order denying said motion, which was entered on September 25, 1975 (A 74).

As previously indicated, plaintiff has appealed from the judgment and the subsequent order denying his motion to set the judgment aside, which appeals have been consolidated upon plaintiff's application to this Court (A 92, 93, 94).

ARGUMENT

I. THE DISTRICT COURT JUDGE HAD THE AUTHORITY TO CONDITION PLAINTIFF'S RELIEF FROM DEFAULT UPON HIS POSTING A $25,000 BOND, AND PROPERLY EXERCISED HIS DISCRETION IN DOING SO.

FRCP 55(c) provides:

> "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

FRCP 60(b) provides, in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * * or (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b) specifically refers to "such terms as are just." Rule 55(c) is based on former Equity Rule 17,

but the omission therefrom of any special reference to terms upon which relief may be granted does not deprive the Court of its inherent power to impose such terms. This is conceded by plaintiff at page 12 of his Brief. See also, 6 Moore's Federal Practice (Second Edition), paragraph 55.02(2) at page 55-13.

In 6 Moore's Federal Practice (Second Edition) under paragraph 55.10(1), at page 55-232, it is further stated, in discussing Rule 55(c):

> "A party in default should make a formal motion, and may be required to post security for costs or for the amount of the judgment in appropriate circumstances." (Emphasis added)

In E. W. Montgomery Co. v. Gwin (DC., Miss., 1932), 58 F.2d 779, the Court, in discussing Equity Rule 17, appropriately said, at page 781:

> "If it is within the power of the court to permit the plaintiff to proceed to a final decree and then to require payment of costs and other terms before setting it aside, it seems to me to be a ruling favorable to the defendant, and one of which he cannot complain, to stop the plaintiff from proceeding to final decree and grant the defendant a hearing at once upon payment of costs and other just terms; and, if upon such hearing the defendant abuses the opportunity afforded him by the court's favorable ruling, the plaintiff may be permitted to take a final decree under rule 17, after which the defendant will have such rights and remedies as are afforded by that rule."

Not only did the District Judge have the power to require plaintiff to post a $25,000 bond as a condition to excusing his default, the discretion he exercised in doing so was clearly proper in the circumstances.

It is fundamental that, notwithstanding the general principle that defaults in pleading should be liberally excused, the defaulting party must satisfy the Court that the default was due to excusable neglect,

that he has a meritorious claim or defense and that the non-defaulting party will not be prejudiced. Moreover, these necessary elements must be shown by evidentiary facts; mere conclusory statements are insufficient.

In Universal Film Exchanges Inc. v. Lust (C.A., 4th, 1973), 479 F.2d 573, 576, the Court emphasized:

> "But the cases do not imply nor should they be read to imply that a District Court will or should always grant relief from a default or summary judgment at the behest of a Rule 60(b)(1) movant.
>
> It is not enough for the moving party to argue that a meritorious defense could now be presented. The proper standard governing these cases is one that is in the conjunctive, not the disjunctive. To prevail, the Rule 60(b)(1) movant must demonstrate that he has a meritorious defense and that arguably one of the four conditions for relief applies--mistake, inadvertence, surprise or excusable neglect."

In Schartner v. Copeland (E.D. Pa., 1973), 59 FRD 653, affirmed without opinion in 487 F.2d 1395,

cited in plaintiff's Brief, the Court stated at page 656:

> "In particular, a Rule 55(c) motion may be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a willful act."

To satisfy these requirements, the affidavits submitted by the defaulting party must set forth evidentiary facts and not merely conclusory statements.

Thus, in Robinson v. Bantam Books, Inc., 49 F.R.D. 139 (S.D.N.Y., 1970), Judge Motley denied a motion to vacate the entry of a default under FRCP 55, stating:

> "An entry of default can be set aside only if the defendants have a meritorious defense. Consolidated Masonry Fireproofing, Inc. v. Wagman Const. Co p., 383 F.2d 249 (4th Cir. 1967); Atlantic Steamers Supply Co. v. International Maritime Supplies Co., 268 F.Supp. 1009 (S.D.N.Y. 1967); Nelson v. Coleman Co., 41 F.R.D. 7, 9 (D.S.C. 1966); C. Wright, Federal

Courts, at 383-4 (1963); J. Moore, Federal Practice ¶55.10[2] (2d Ed. 1965). Despite this cardinal prerequisite, defense counsel has made only a conclusory statement that the two defendants' have a just and meritorious defense.' That is manifestly not sufficient. Defendants must 'state underlying facts to support [their] claim of a meritorious defense.' Consolidated Masonry, supra, 393 F.2d at 252." (Emphasis added)

Similarly, in granting a motion for the entry of a default judgment and denying a cross-motion to dismiss the complaint, the Court held, in Atlantic Steamers Supply Co. v. International Maritime Supplies Co. (S.D.N.Y., 1967), 268 F.Supp. 1009:

". . . Even if we were inclined under Rule 60(b) to relieve the defendant from such default because of mistake, inadvertence or excusable neglect, the defendant has failed to submit a sufficient affidavit of merits. At most, the affidavit of the former attorney for the defendant contains two or three conclusory statements alleging as defense the breach of three covenants (which are not otherwise explained) and the recision of the contract based upon a cable by the plaintiff." (Emphasis added)

In Consolidated Masonry Fireproofing, Inc. v. Wagman Construction Corporation (4th Cir., 1967), 383 F.2d 249, the Circuit Court found no abuse of discretion on the part of the lower Court in refusing to set aside the default and in proceeding to final judgment, stating:

> "Furthermore, the defendant did no more than allege in conclusory fashion that it had a meritorious defense. It presented no statement of underlying facts to support this conclusion to enable the court to appraise the merits of the claimed defense . . . . The defendant did no more than state that plaintiff breached the contract, a mere conclusion which fell far short of providing the court with a satisfactory explanation of the merits of the defense." (Emphasis added)

To the same effect see Madsen v. Bumb (9th Cir., 1969), 419 F.2d 4.

The single affidavit by plaintiff and the several affidavits by his attorneys are clearly insufficient to satisfy the aforesaid requirements for excusing his default. Of course, plaintiff's complaint, being unverified, cannot be considered for this purpose.

The first affidavit was that of plaintiff's attorney submitted in support of his motion under FRCP 55(c) to set aside his default. It merely refers the Court, in paragraph 7, to "the contention of plaintiff" as set forth in the complaint (A 27), and is clearly insufficient as an affidavit of merits.

Nor is it adequate to show that plaintiff's default was the result of excusable neglect. While plaintiff's attorney states that he dictated to a secretary a reply to the counterclaim which was "apparently never typed, served or filed" (A 26), he utterly fails to explain why this occurred, especially since the counterclaim was twice called to his attention in defendant's original answer and later again in defendant's amended answer. Nor has any affidavit been submitted by his secretary to whom he says the reply was dictated.

The next affidavit was again an affidavit of plaintiff's attorney submitted in opposition to defendant's renewed motion for default judgment. He merely states, on the issue of a meritorious defense, that in telephone conversations with plaintiff he was informed that plaintiff would "gather information to show that he was indebted to the sum of 4,000,000 Riyals as a result of the facts and circumstances giving rise to this cause of action and that the papers to substantiate such facts would be transmitted in the immediate future * * * " (A 54). Such conclusory statements are manifestly insufficient to show a meritorious defense to the counterclaim. Furthermore, the promised substantiating papers were never submitted to the Court.

The only affidavit by plaintiff himself is the one sworn to on June 19, 1975, which was submitted in support of the withdrawn motion to eliminate the bond requirement and later resubmitted in support of plaintiff's Rule 60(b) motion (A 58, 69).

It is devoid of evidentiary facts tending to show a meritorious defense to defendant's counterclaim, and contains only such conclusory statements as that plaintiff suffered financial loss "because of the actions of the defendant in failing to deliver in accordance with time schedules, in failing to deliver in accordance with specifications and in failing to deliver at all" (A 59).

Lastly, there is the affidavit of plaintiff's counsel submitted in support of plaintiff's Rule 60(b) motion, in which counsel purports to summarize and characterize plaintiff's deposition (A 70). As such, it is purely hearsay and obviously insufficient to constitute an affidavit of merits.

Thus, plaintiff has still to show that he has a meritorious defense to defendant's counterclaim despite the submission of four affidavits, one of his own and three by his counsel.

Nor is plaintiff's disclaimer of any prejudice to defendant valid. Plaintiff is a citizen and resident of Saudi Arabia, and is engaged in business there (A 58). For aught that appears in any of the papers submitted by or on behalf of plaintiff, he has no assets in this country. He claims to be insolvent and even financially unable to post the required bond (A 58-60); Plaintiff's Brief, pages 6, 16, 18).

Therefore, but for the bond, should defendant defeat plaintiff's claim and prevail on its counterclaim for $110,893.25, defendant would not only be left with an unsatisfiable judgment but also have to bear costs, expenses and attorneys' fees incurred by reason of the institution of this suit by plaintiff. In such circumstances, and absent a sufficient affidavit of merits, the District Court correctly conditioned the opening of plaintiff's default on the posting of a $25,000 bond. This would at least enable defendant, if successful, to recoup

part of the substantial expenses which it is being compelled to incur because of this litigation.

In Thorpe v. Thorpe (D.C., Cir., 1966), 364 F.2d 692, 694, cited in plaintiff's Brief, the Court noted that it may be appropriate in some cases for a party "to post bond to secure the amount of the default judgment pending trial on the merits."

However, in the Thorpe case, supra, and in Wokan v. Alladin International, Inc. (3rd Cir., 1973), 485 F.2d 1232, also cited in plaintiff's Brief, the District Court erred in requiring the posting of an amount which exceeded the unsatisfied portion of the default judgment, as a condition of vacating the same. That is not the case here where plaintiff was required to post a $25,000 bond against defendant's counterclaim for $110,893.

Finally, it should be noted that in Flaksa v. Little River Marine Construction Co. (5th Cir., 1968), 389 F.2d 885, also cited in plaintiff's Brief,

the Court held (p. 889) not only that it was within the lower court's discretion "to impose reasonable sanctions", but also that:

> "In arriving at his decision, the trial judge may take into account the full record of conduct in this case from the beginning. Diapulse Corp. of America v. Curtis Pub. Co., 2 Cir., 374 F.2d 442, 447 (1967)."

It is respectfully submitted that taking into account "the full record of [plaintiff's] conduct in this case from the beginning", the condition imposed by Judge Weinfeld for excusing plaintiff's default was warranted and eminently justified.

II. THE DISTRICT COURT JUDGE DID NOT ABUSE HIS DISCRETION IN DIRECTING ENTRY OF A DEFAULT JUDGMENT UPON DEFENDANT'S COUNTERCLAIM.

This is not a case where plaintiff was not given an opportunity to cure his default. The default judgment was entered only after plaintiff failed to post the bond despite ample opportunity to do so, and then claimed, but did not substantiate, inability to do so.

FRCP 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The judgment entered upon defendant's counterclaim contains a determination that there is "no just reason for delay of entry of this judgment" (A 65). Plaintiff did not object thereto although he had notice of the settlement of the judgment (A 64) and the proposed inclusion therein of such determination.

Its inclusion was clearly warranted, not only because plaintiff had been afforded ample opportunity to avoid entry of the judgment by posting a $25,000 bond despite the absence of an affidavit of merits, but also because plaintiff utterly failed to substantiate his claim that he was unable to obtain such a bond (A 59). On the contrary, the letter from a bank in Saudi Arabia, which he attached to his affidavit in an attempt to corroborate such claim, merely shows an unsuccessful attempt to obtain from that bank a "Letter of Guarantee for U.S.$25.000--in favor of United States Court" (A 59, 61).

Except for conclusory statements of his financial condition, plaintiff's affidavit failed to demonstrate that he was financially or otherwise unable to obtain a bond in the amount or type which would have satisfied the condition for vacating his default.

We respectfully submit that it cannot properly be said that the entry of the default judgment on defendant's counterclaim was an abuse of discretion where, as in the instant case, plaintiff did not satisfactorily explain his default; did not satisfactorily show that he has a meritorious defense to the counterclaim; did not post a bond extremely fair in amount relative to the counterclaim, which would have prevented entry of the judgment; and did not substantiate his claim of inability to post such bond. To have refrained from entry of the judgment would have been to disregard plaintiff's repeated disregard and violation of established statutes, rules and decisions promulgated to assure the orderly and proper conduct of litigation and prevent conduct prejudicial to the adverse party.

Plaintiff is in error in his basic premise that the Rule 54(b) determination was improper and an abuse of discretion because "the complaint does, in fact,

put the counterclaim in issue" (Plaintiff's Brief, p. 20). The law is clear that defendant's counterclaim for the price of equipment sold and accepted cannot be defeated by the existence of plaintiff's claim for damages for breach of warranty or the like.

Identically on point is United States v. Crawford (5th Cir., 1971), 443 F.2d 611. There heavy equipment was sold to the defendant contractor for installation at a U. S. Naval Air Station. The plaintiff seller of the equipment had commenced the action to recover the balance of the purchase price and during the trial had made a motion for a directed verdict on that issue. The defendant purchaser had asserted counterclaims based upon alleged breach of warranty, late delivery and improper performance of the sales agreement, which counter-claims were well in excess of the balance due for

the purchase price. The Trial Court had denied the plaintiff's motion for a directed verdict; the Circuit Court reversed and remanded, stating:

> "The contract price for the fuel filter/separator units was $55,564.20. Floyd Crawford admitted at the trial that of that sum, $6,298.50 had not been paid. There was no testimony to the contrary. The appellees maintain that they are excused from further payment by the deficiencies in Fram's performance on the contract. Fram contends, to the contrary, that the Trial Judge should have directed a verdict in its favor on its claim for the $6,298.50. We sustain Fram's contention.
>
> It is undisputed that Fram furnished the eighteen fuel filter/separator units called for by the contract, and that Crawford received and installed all eighteen units. Section 2-607 of the Uniform Commercial Code as enacted in Georgia (hereinafter "Georgia UCC") provides without qualification:
>
> 'The buyer must pay at the contract rate for any goods accepted.' Acceptance of goods occurs when the buyer 'does any act inconsistent with the seller's ownership.'"

In New York, the Code section, UCC 2-607(1), is the same as in Crawford and the New York Courts have applied the section with the same result. In Sunny Side Up, Inc. v. Agway, Inc., 40 A.D.2d 899, 337 N.Y.S.2d 567 (3rd Dept. 1972), the purchaser of allegedly defective goods sought damages well in excess of the balance due for the purchase price; in addition, individual guarantors of payment of the purchaser's obligation to the seller sought cancellation of the guarantees by reason of the alleged breach of warranty. The seller of the goods, on the other hand, sought payment upon the guarantees from the guarantors in a separate action. In disposing of various motions for dismissal and in reversing an order which had consolidated the separate actions, the Appellate Division, citing Crawford, held that one claim had nothing to do with another. The Court held:

> ". . . A denial of indebtedness solely because of a pending cause of action for breach of warranty does not, however, state a cause of action for cancellation of the guaranty. Once the goods were accepted the respondent corporation was required to pay for them at the contract price. Its claim for damages for defective items is separate and apart from its indebtedness for the purchase price. (Uniform Commercial Code, § 2-607; see also United States for use of Fram Corp. v. Crawford, 5 Cir., 443 F.2d 611.) The cause of action for cancellation of the guaranty should, therefore, be dismissed, and thus no common questions of law or fact in the two actions remain."

International Paper Company v. Margrove, Incorporated, 75 Misc. 2d 763, 348 N.Y.S.2d 916 (Sup. Ct. 1973), was an action for the price of goods sold. The defendant alleged an affirmative defense and a counterclaim in excess of the balance due for the purchase price, based upon the delivery of alleged defective products in violation of warranties. Plaintiff moved for summary judgment for the price. The motion was granted, the Court stating:

"As stated, there is no dispute as to the fact that plaintiff delivered and defendant received the goods which plaintiff now asks payment for. Defendant's only claim, both in defense of plaintiff's action and as its counterclaim, is that the goods were defective. Since defendant did not reject the goods, Sec. 2-602 Uniform Commercial Code is not applicable, but Sec. 2-607 is. This section says, in Subd. 1, that where goods have been accepted 'The buyer must pay at the contract rate for any goods accepted.'"

Accordingly, the fact that plaintiff here is asserting damage claims for breach of warranty and late delivery, etc. does not and will not provide a defense to defendant's present right to receive payment for the price of delivered and accepted equipment.

At pages 20-22 of his Brief, plaintiff stresses, in support of his contention that Judge Weinfeld erred in making the Rule 54(b) determination, that the claims of plaintiff and defendant "arise out of the same transaction", that "the counterclaim is a compulsory one",

and that there is a "close relationship between issues in the complaint and in the counterclaim".

However, in Cold Metal Process Co. v. United Co. (1956), 351 U.S. 445, the Supreme Court held at page 452:

> "* * * under [Rule 54(b)], we need not decide whether United's counterclaim is compulsory or permissive. The amended rule, in contrast to the rule in its original form, treats counterclaims, whether compulsory or permissive, like other multiple claims. * * * Therefore, under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion." (Emphasis added)

And, in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, decided at the same term as the Cold Metal case, where judgment had been directed in favor of defendant dismissing Counts I and II of the complaint without leave to amend, under a Rule 54(b) determination, while Counts III and IV continued at issue, the Supreme Court, in affirming such determination, pointed out (p. 436) that

Counts I and II could be "decided independently of each other", notwithstanding that "* * * the claim in Count I does rest in part on some of the facts that are involved in Counts III and IV" (footnote at p. 347).

So too, in the instant case, where, as hereinabove shown, defendant is entitled to recover the sales price of the equipment sold and delivered to plaintiff notwithstanding plaintiff's assertion of claim for damages for alleged breach of warranty, the District Court's Rule 54(b) determination is not necessarily an abuse of discretion because plaintiff's complaint and defendant's counterclaim rest in part on some common facts, or because defendant's counterclaim is compulsory, or because the claims involved in the complaint and counterclaim arose out of the same transaction.

There are additional compelling circumstances herein -- plaintiff's failure to show that his default

was due to excusable neglect, and his failure to show that he has a meritorious defense to the counterclaim, and his failure to post the bond or show his alleged inability to do so -- which justified the District Court's determination that there was no just reason to delay entry of the judgment on defendant's counterclaim.

Plaintiff contends, at page 26 of his Brief, obviously to evoke the sympathy of this Court, that by reason of the default judgment on defendant's counterclaim and consequent application of the doctrine of res judicata, plaintiff is "for all practical purposes, totally out of court".

What plaintiff is estopped from contesting at the trial is his liability for certain of the electrical equipment which was received, accepted but not paid for, having a value of $88,798.92, and certain of the electrical equipment which he refused to take delivery of, having a value of $22,095.00. These are the allegations of the counterclaim (A 12) which plaintiff admitted by his failure to deny them and which are therefore merged into the judgment.

However, there is no allegation in the counterclaim with respect to those items of electrical equipment which

were delivered, accepted and paid for by plaintiff. He has not made any admission with respect to those items of electrical equipment, and he is free to prove at the trial, if he can, any damages sustained by him with respect to them. Indeed, defendant is willing to so stipulate.

In Last Chance Mining Co. v. Tyler (1895), 157 U.S. 683, 692, the Supreme Court noted:

> "Bigelow, in his work on Estoppel (p. 77), closes a discussion of the question with this observation: 'The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.' (Citing cases)." (Emphasis added)

III. THE DISTRICT COURT JUDGE DID NOT ERR IN DENYING PLAINTIFF'S MOTION UNDER RULE 60(b) TO SET ASIDE THE JUDGMENT.

Instead of appealing from the default judgment entered upon defendant's counterclaim, plaintiff moved under FRCP 60(b) to set said judgment aside, principally upon the affidavit of plaintiff which had previously been

submitted in support of his motion, later withdrawn, to delete the bond requirement (A 67).

This obviously was an attempt to reargue plaintiff's prior motions to excuse his default without posting any bond and as a substitute for an appeal from the default judgment (A 75).

The District Court properly denied said motion since it is well settled that a Rule 60(b) motion may not be used as a vehicle for reargument or as a substitute for appeal.

As this Court succinctly stated in Wagner v. United States (1963), 316 F.2d 871, 872:

> "The catch-all clause of Rule 60(b)(6), authorizing the court to relieve a party from a judgment for 'any other reason justifying relief', cannot be read to encompass a claim of error for which appeal is the proper remedy * * * *."

In Loucke v. United States (S.D., N.Y., 1957), 21 F.R.D. 305, 308, Judge Herlands held:

> "The principle expounded in these cases is that only where the total record portrays

extraordinary circumstances--of which the litigant's lack of financial means is only one factual element--may a party who failed to appear or appeal resort to the extreme remedy afforded by Rule 60(b) (6). See 7 Moore, Federal Practice, para. 60.27[2].

In the interstices of such procedural provisions as Rule 60(b) is expressed the law's transcendant concern with the doing of practical justice. We have been warned not to harden the arteries of such 'liberalizing rules like 60(b)' by resorting 'to ancient commonlaw concepts.' Mr. Justice Black, dissenting, in the Ackermann case, supra, 340 U.S. at page 205, 71 S.Ct. at page 215.

But this rule was not designed to supersede the normal and ordinary channels of relief. Nor was it intended to invest the court with an omnipotence whose boundary is defined only by the court's conscience.

Considerations of judicial administration and of the stability of the law no less than the obligation of doing individual equity must be balanced and adjusted. An explicit choice of values is represented by the landmark decision in the Ackermann case, supra.

Moved by the foregoing considerations, the courts have enunciated the dual proposition that Rule 60(b)(6) is not a substitute for appeal and that resort to the rule in order to obtain relief from a judgment is not justified merely because the judgment is erroneous or because the decisional law has been changed by a subsequent ruling."

In Blair v. Delta Air Lines, Inc. (S.D., Fla., 1972), 344 F.Supp. 367, affirmed (5th Cir., 1973), 477 F.2d 564, the District Court emphasized at page 368:

> "Rule 60, Fed.R.Civ.P., Relief from Judgment or Order, is applicable to clerical mistakes, mistakes in general, inadvertence, fraud and other reasons justifying relief. However, it does not provide for general reconsideration of an order or judgment, notwithstanding the inherent power of the Court over its judgments. As stated in Barron & Holtzoff, 3 Federal Practice and Procedure § 1322 (1958) at 395:
>
> > The Rule is not intended to provide a procedure by which to challenge a supposed legal error of the court, nor to obtain relief from errors which are readily correctible on appeal."

CONCLUSION

The default judgment on defendant's counterclaim and the order denying plaintiff's motion under Rule 60(b) to vacate said judgment, should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HELEN GOODMAN, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age, and resides at 3636 Greystone Avenue, Bronx, New York 10463.

On December 31, 1975 deponent served two copies of the within Brief of Defendant-Appellee, Westinghouse Electric Corporation, upon GEORGE T. MAHSHIE, ESQ., attorney for Plaintiff-Appellant, at 503 East Washington Street, Syracuse, New York 13202, the address designated by said attorney for that purpose, by depositing the same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Helen Goodman
Helen Goodman

Sworn to before me this
31st day of December, 1975

Charles Wayne
Notary Public

CHARLES WAYNE
NOTARY PUBLIC, State of New York
No. 30-9554150
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976